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Uniphoenix Corporation Bhd v Raymond Leong Ah Kat

HIGH COURT (KUALA LUMPUR) — RAYUAN SIVIL NO R2–12–647–2001
FAIZA TAMBY CHIK J
13 MARCH 2002

Companies and Corporations — Separate legal entity — Lifting the veil of incorporation — Whether defendant had absolute control over subsidiaries — Whether it has a common board of directors or management consisting of the same persons — Whether the defendant was the brain and mind of its subsidiary

Labour Law — Employment — Contract of employment — Privity — Whether existed between parties

Labour Law — Employment — Employees — Change of employer — Whether notice of termination of termination must be given to employee — Whether defendant to obtain consent from plaintiff to be transferred to a purported new employer — Employment Act 1955 s 12(3)

Labour Law — Employment — Employees — Change of employer — Whether plaintiff a employee of defendant — Retirement benefits — Whether defendant liable for retirement benefits to be paid on employee's resignation — Whether defendant could withdraw retirement benefits — Whether payment of benefits a common practice in industry

The appellant/defendant appealed to this court against the decision of the sessions court judge in holding that the plaintiff was an employee of the defendant and was therefore liable for his entitlement to retirement benefits upon his resignation. The defendant's grounds of appeal were as follows, namely (i) that the sessions court judge had erred by lifting the veil of incorporation even though Flexipak Sdn Bhd was a separate legal entity from the defendant; (ii) that there was no privity of contract between the defendant and the plaintiff; (iii) that there was no proof and/or evidence to suggest that the defendant controlled every movement of Flexipak Sdn Bhd; (iv) that there was no evidence to show that both Flexipak Sdn Bhd and the defendant had a common board of directors and/or that the management consists of the same persons; (v) that the sessions judge had failed to consider and direct his attention to the fact that the plaintiff's claim should be made against his employer that is Flexipak Sdn Bhd, and not the defendant; (vi) that the sessions judge had erred in finding that the issue of whether the retirement benefits should be paid by a third party is a non-starter.

Held, dismissing the appeal with costs

(1) Whilst it may be true that Flexipak Sdn Bhd may be a separate legal entity from the defendant, there was sufficient evidence to prove that the latter had absolute control over its subsidiaries and associate companies. This was substantiated by a search at the registry of companies which confirmed that the defendant was the brain and mind of its subsidiaries and had total control over them, and therefore had expressed intention to confirm the plaintiff in his employment with the defendant and/or its subsidiaries and/or its associated companies (see paras 7 and 12).

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(2) The letter of promotion issued by the defendant to the plaintiff substantiates the fact that there was privity of contract between the parties. The courts are prepared to lift the corporate veil where the notion of separateness of companies is used as a mode to evade contractual obligations or duties (see para 28).

(3) Even if the defendant had sold its subsidiary, s 12(3) of the Employment Act 1955 requires the defendant to give the plaintiff a notice of termination and to obtain the plaintiff's consent to be transferred to a new employer. This, the defendant did not do (see para 37).

(4) In employment relations as well as in commercial relations, customs, practice, or terms and conditions that have been generally expressed in contracts which have not been revoked, rescinded, terminated or annulled by the introduction of subsequent terms and conditions of employment are to be assumed by the court to be so prevalent in a trade, industry or locality (see para 31).

(5) The defendant failed to prove that the retirement benefits provided by art 18 of its collective agreement had been withdrawn, annulled or cancelled. As such, the retirement benefits contained in the said collective agreement and the scheme of service for executive staff continue to apply to the plaintiff and, should be paid to the plaintiff by the defendant upon the plaintiff's resignation. The defendant failed to substantiate its intention to withdraw the retirement benefits payable on resignation to all employees when the employees resign from their services with the defendant, where the benefits will be computed according to the retirement benefit provision (see para 36).

[**Bahasa Malaysia summary**

Perayu/defendan merayu kepada mahkamah ini terhadap keputusan hakim mahkamah sesyen bahawa plaintif adalah seorang pekerja defendan dan oleh yang demikian layak serta berhak untuk faedah persaraan apabila meletakkan jawatan. Alasan rayuan defendan adalah seperti berikut iaitu (i) bahawa hakim mahkamah sesyen telah membuat kesilapan dengan menyelak tabir pemerbadaan walaupun Flexipak Sdn Bhd adalah entiti berasingan di sisi undang-undang daripada defendan; (ii) bahawa tiada priviti kontrak di antara defendan dan plaintif; (iii) bahawa tiada bukti dan /atau keterangan untuk mencadangkan defendan mengawal setiap pergerakkan Flexipak Sdn Bhd; (iv) bahawa tiada keterangan untuk menunjukkan bahawa Flexipak Sdn Bhd dan defendan mempunyai ahli lembaga pengarah yang sama dan/atau pengurusan merangkumi orang yang sama; (v) bahawa hakim mahkamah sesyen telah gagal untuk membuat pertimbangan dan mengarah perhatiannya kepada fakta bahawa tuntutan plaintif harus terhadap majikannya iaitu Flexipak Sdn Bhd, dan bukan defendan; (vi) bahawa hakim mahkamah sesyen telah khilaf dalam memutuskan bahawa isu sama ada faedah persaraan harus dibayar oleh pihak ketiga adalah sesuatu yang tidak boleh dibangkitkan.

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Diputuskan, menolak rayuan dengan kos:

(1) Walaupun mungkin benar bahawa Flexipak Sdn Bhd adalah suatu entiti berasingan di sisi undang-undang daripada defendan, terdapat keterangan yang mencukupi untuk membuktikan bahawa yang defendan mempunyai kuasa kawalan yang mutlak ke atas subsidiari dan syarikat bersekutu. Ini disokong oleh carian yang dibuat di pejabat pendaftaran syarikat yang mengesahkan bahawa defendan adalah minda dan pemikiran subsidiarinya dan mempunyai kawalan sepenuhnya ke atas mereka, dan oleh yang demikian telah menyatakan niatnya untuk mengesahkan plaintif dalam pekerjaannya dengan defendan dan/atau dengan subsidiarinya dan/atau dengan syarikat bersekutu (lihat perenggan 7 dan 12).

(2) Surat kenaikkan pangkat yang dikeluarkan oleh defendan kepada plaintif menyokong kenyataan bahawa ada priviti kontrak di antara parti-parti. Mahkamah sedia untuk menyelak tabir pemerbadaan di mana pengasingan syarikat digunakan sebagai cara untuk mengelakkan kewajipan atau tanggungjawab (lihat perenggan 28).

(3) Jikapun defendan telah menjual subsidiarinya, s 12(3) Akta Pekerjaan 1955 memperuntukkan defendan untuk memberi plaintif notis pemberhentian kerja dan mendapat kebenaran plaintif untuk ditukar kepada majikan baru. Ini tidak dilakukan oleh defendan (lihat perenggan 37).

(4) Dalam perhubungan pekerjaan serta juga dalam perhubungan komersial, adat, amalan atau terma dan syarat yang biasanya tertera dalam kontrak yang tidak terbatal, dibatalkan, ditamatkan atau dimansuhkan dengan memperkenalkan kemudiannya terma dan syarat pekerjaan dianggap oleh mahkamah tersebar luas dalam perdagangan, industri atau kawasan (lihat perenggan 31).

(5) Defendan gagal membuktikan bahawa faedah persaraan yang diberi oleh perkara 18 dalam perjanjian bersama telah diambil balik, dimansuhkan atau dibatalkan. Oleh itu, faedah persaraan terkandung dalam perjanjian bersama dan jadual perkhidmatan untuk kakitangan eksekutif masih digunapakai oleh plaintif dan harus dibayar kepada plaintif oleh defendan apabila plaintif meletak jawatan. Defendan gagal untuk menyokong niatnya untuk menarik balik pembayaran faedah persaraan kepada semua pekerja apabila pekerja meletakkan jawatan dengan defendan, di mana faedah dikira menurut peruntukan faedah persaraan (lihat perenggan 36).]

Notes

For cases on lifting the veil of incorporation, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 670-692.

For cases on contract of employment, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 796-817.

For cases on employees, see 8(1) *Mallal's Digest* (4th Ed 2003 Reissue) paras 879–882.

For companies, see 13 *Halsbury's Laws of Malaysia*.

For contract of employment, see 7 *Halsbury's Laws of Malaysia*, para [120.002].

For employees, see 7 *Halsbury's Laws of Malaysia*, para [120.004].

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Cases referred to

Automotive Manufacturers (M) Sdn Bhd, Pahang v Transport Equipment & Allied Industries Employees Union [1986] 1 ILR 404 (refd)
British Broadcasting Corporation v Hearn and Others [1978] 1 All ER 111 (refd)
Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong [1998] 3 ILR 843 (refd)
DHN Food Distributors Ltd and Others v London Borough of Tower Hamlets [1976] 3 All ER 462 (refd)
Ford v William Beech (1848) 11 QB 842 (refd)
Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (refd)
Lloyd v Lloyd (1837) 2 My & Cr 192 (refd)
London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd [1958] 2 All ER 411 (refd)
Pannell v Mill (1846) 3 CB 625 (refd)
Radtha d/o Raju & Ors v Dunlop Estates Bhd [1996] 1 MLJ 561 (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533 (refd)

Legislation referred to

Contracts Act 1950 s 10
Employment Act 1955 s 12(3)
Industrial Relations Act 1967

Appeal from: Saman No. 4–52–5674–96 (Sessions Court, Kuala Lumpur)

KW Moh (Tengku Mohamed & Alan Lim) mentioning for the defendant/appellant.
Bosco Philip Anthony (Colin Victor with him) (Bosco Philip Anthony & Associates) for the plaintiff/respondent.

Faiza Tamby Chik J:

[1] This is an appeal by the appellant/defendant from the judgment of the learned sessions court judge given on 29 August 2001 after a full trial. The issues before the sessions court are:

(1) Whether the respondent/plaintiff was employed by the defendant's company?

(2) If so, whether the plaintiff is entitled to retirement benefits upon resignation from the defendant's company?

(3) Whether the retirement benefits are to be paid by the defendant's company or a third party?

[2] In summary the grounds of appeal are that the learned sessions court judge had erred in law and in fact in finding that:

(i) that even though Flexipak Sdn Bhd is a separate legal entity from the defendant, he had lifted the veil of incorporation;

(ii) that there was no privity of contract between the defendant and the plaintiff;

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(iii) that no proof and/or evidence was tendered before the court to suggest that the defendant controlled every movement of Flexipak Sdn Bhd;

(iv) that there was no proof and/or evidence tendered before the court to show that Flexipak Sdn Bhd and the defendant had a common Board of Directors and/or that the management consists of the same persons;

(v) that the court had failed to consider and direct his attention to the facts that the plaintiff's claim should be made against his employer that is Flexipak Sdn Bhd and not the defendant;

(vi) that the court had erred in law and in fact in finding that the issue of whether the retirement benefits should be paid by a third party is a non-starter.

[3] Reference is made to pp 51 to 53 and 166 of the record of appeal Vol 1 (exh P–1 and P–5). At p 51 is a letter dated 16 July 1990 issued by the defendant to the plaintiff which inter alia states:

> … We are pleased to confirm your promotion to Production Executive with effect from July 1990. …
>
> … In view of the nature of your job, you are required to possess your own car for the purpose of carrying out the company's business and performing your duty … .
>
> … Your functions will encompass the entire operational matters for both Flexipak and Steripak … .

[4] And at p 52:

> … Other Terms and Conditions
>
> Your employment shall also be subject to the terms and conditions of the scheme of service currently in force for the company's employees … of or incidental to your employment by the company or any of its subsidiaries or associated companies … .

[5] Further at p 53:

> … You will also be entitled to your bonus under the union agreement on a pro-rata basis up to and including the effective date of your promotion.

[6] At p 166 of the letter dated 14 December 1990 issued by the defendant to the plaintiff, it inter alia states:

> … It has been some four months since completion of the restructuring exercise and the birth of Uniphoenix … .
>
> … The Board of Directors have recently approved for adoption the executive manual which sets out the general terms and conditions of employment applicable to all executives of the Group … .

[7] Hence based on the above documentary evidence, I am of the opinion that the defendant has had absolute control over its subsidiaries and its associate companies and thereby unequivocally has expressed its intention of confirming the plaintiff in his employment with the defendant and/or its subsidiaries and/or its associate companies. At p 52, the defendant further

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categorically states at para 1.9 of the said letter that the plaintiff's employment shall be subject 'to the terms and conditions of the scheme of service currently in force for the Company's employees'. What the defendant means by that particular statement is that the terms and conditions as appearing at pp 128–139 of the record of appeal Vol 1 (which was marked as exh P–3), that the plaintiff would continue to enjoy the benefits, in particular, arts 18 and 19 appearing at pp 138–139. Further, the letter of the defendant dated 14 December 1990 confirms the completion of the restructuring exercise and the introduction of the executive manual setting out the general terms and conditions of employment applicable to all the executives of the Group. The executive manual appears at pp 54–127 of the record of appeal Vol 1 (exh P–2) and the pertinent part to be taken into consideration in the determination of this appeal are the following:

[8] At p 56:

ARTICLE 1 – PREAMBLE

(1) This manual lays down the general terms and conditions of employment applicable to all executives in the full time employment of Uniphoenix Corporation Berhad Group of Companies ('the Company' excluding joint venture companies). …

ARTICLE 3 – ADMINISTRATION & INTERPRETATION

(1) This manual shall be administered by and under the direction of the Group Chief Executive.

[9] At p 57:

4 Where any terms exists in the individual contract of service of those executives within the scope of this manual, which is in conflict with the provisions of this manual, the provisions of this manual shall prevail. This manual is drawn to cover all existing terms and conditions prior to the enforcement of this manual and therefore supercedes all the terms and conditions earlier provided in the letter of appointments prior to the date of enforcement of this manual.

1.1 The 'Company' shall mean Uniphoenix Corporation Berhad and its subsidiaries …

[10] Apart from the above it must be noted that since the plaintiff was a member of the union prior to his promotion as an executive, at pp 140–165 of the record of appeal Vol 1 (exh P–4) refer to the Collective Agreement entered into between the defendant and the plaintiff's union. At p 140, it states:

UNIPHOENIX CORPORATION BERHAD

COLLECTIVE AGREEMENT 1993

[11] At p 144:

ARTICLE 8 – ASSURANCE & COMPANY RECOGNITION

(1) The Union recognises the right of the Company to operate and manage its business in all respects and assures the Company that all its members will loyally co-operate with the Company in working for the advancement of the Company's business …

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[12] For the sake of completeness of consideration of evidence in this case I also take note of exhs P–6, P–7, P–8, P–9 and P–10A. On the issue of there being no proof before the sessions court to show that Flexipak and the defendant had a common board of directors or the management consist of the same persons, reference must be made at pp 173–245 of the record of appeal Vol 1 (exh P–11) in particular at pp 187–191 and pp 233–238. This relates to the Registry of Companies search which makes it crystal clear and confirms the fact that the defendant was the brain and mind of its subsidiaries and its subsidiaries were bound hand and foot to the defendant. On the issue that the sessions court had failed to consider and direct his attention to the facts that the plaintiff's claim should be made against his employer, that is Flexipak Sdn Bhd and not the defendant, reference should be made to pp 231–258 of the record of appeal Vol 2. I also take note the Originating Petition No. D1–26–9–90 in particular at p 233, para 2 of the Order and the First Schedule of the Order referred to as Scheme A, para 2(a) at pp 245–246 which inter alia states:

[13] At p 233:

> 2 That the reduction by way of cancellation of capital of the first Petitioner of $77,193,333 and that the creation of 77,193,333 shares of $1 each by the first Petitioner and such shares to be allotted and issued credited as fully paid-up to Uniphoenix Corporation Berhad.

[14] **[14]**At pp 245-246:

> 2(a) In consideration for the cancellation of the Scheme Shares and the issuance and allotment of the newly created 77,193,333 shares by API to Newco, Newco shall allot and issue credited as fully paid-up ordinary shares of $1 each in Newco (and in case of the two shares in Newco already allotted and issued procure the transfer of) to the persons as at the close of business on the termination date on the following basis:
>
> For every four (4): One (1)
>
> Scheme Shares: Newco Share …

[15] It is observed that based on the said Order, all the paid-up capital of Associated Properties & Industries Bhd ('API') and its wholly-owned subsidiaries has been cancelled and by virtue of the said court order, for every four shares of API, one share in the defendant was issued to API. Therefore, the issue of the plaintiff's claim for retirement benefits to be paid on resignation, should be made against Flexipak Sdn Bhd does not arise as when the defendant acquired API and its subsidiaries, pursuant to the Originating Petition No. D1–26–9–90, the entire share capital of API has been reduced by virtue of the Order of the High Court dated 24 April 1990 to nil, which categorically means that the defendant is absolutely and completely the employer of the plaintiff.

[16] As for the issue of the plaintiff's retirement benefits being paid by a third party, reference should be made to pp 168–170 of the record of appeal Vol 1 (exhs P–7, P–8 and P–9). Page 168 confirms that the plaintiff resigned from the service of the defendant on 2 October 1995 and at p 170 is the defendant's confirmation dated 6 October 1995 confirming that the plaintiff's

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last day of employment will be on 1 January 1996. Therefore, the submission that the defendant sold its subsidiaries to Corporate Beam (M) Sdn Bhd as appearing at pp 249–263 of the record of appeal Vol 1 (exh D–4) was irrelevant and is a non-starter.

[17] According to the Employment Act 1955, ' "contract of service" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract', and ' "employer" means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the work "employ", with its grammatical variations and cognate expressions, shall be construed accordingly'.

[18] According to the Industrial Relations Act 1967, ' "contract of employment" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman' and ' "employer" means any person or body of persons, whether corporate or unincorporate, who employs a workman under a contract of employment, and includes the Government and any statutory authority, unless otherwise expressly stated in this Act'.

[19] When exh P–1 which appears at pp 51–53 of the record of appeal Vol 1 is read together with exhs P–2, P–3 and P–4 which appear at pp 54-165 of the record of appeal Vol 1, it makes abundantly clear that the plaintiff was governed by the terms and conditions of employment as provided for in the respective documents. Section 10 of the Contracts Act 1950 provides:

(1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

(2) Nothing herein contained shall affect any law by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

[20] In the case of *Ford v William Beech* (1848) 11 QB 842, at p 866 (ER Vol CXVI 689, at p 698) the court held that:

> The question for the decision of the court is, therefore, what is the legal effect of the agreement between the parties, set forth in the plea: that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as AB shall continue to make the quarterly payments; or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages in the event of his suing contrary to its terms.
>
> In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied: namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the while of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.

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[21] In the case of *Lloyd v Lloyd* (1837) 2 My & Cr 192, at p 202 (ER Vol XL 613, at p 617), the court held:

> … and the [202] question is, whether there is not enough to shew that such a construction would defeat the intention, and that the intention was that each of the contracting parties should be liable for the performance of his own covenant, whether the other party could or could not, or did or did not perform his.
>
> If the provisions are clearly expressed, and there is nothing to enable the court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory, and if there be grounds, appearing upon the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention.

[22] In the case of *Pannell v Mill* (1846) 3 CB 625, at p 638 (ER Vol CXXXVI 250, at p 255), the court held:

> But, passing this by, there is another reason why the construction contended for by the defendant ought not to be adopted. It is not enough for the defendant to make out a possible intention favourable to his view: he must shew a reasonable certainty that the intention is such as he suggests.

[23] I think that whilst it may be true that Flexipak Sdn Bhd may be a separate legal entity from Uniphoenix Corporation Bhd, the evidence shows otherwise. It makes it clear from the intention of the parties, that the defendant was the employer of the plaintiff. It is clear that the parties have contracted with free will. In this case since the defendant had not put forth any evidence before the sessions court to state that the retirement benefits provided in art 18 of exh P–3 (at p 138 of the record of appeal Vol 1) has been withdrawn, annulled or cancelled, the retirement benefits provided for in the Collective Agreement and the Scheme of Service for Executive Staff continues to apply to the plaintiff and should be paid to the plaintiff by the defendant upon the plaintiff's resignation from the defendant.

[24] I think the issue of there being a separate legal entity is not disputed. The defendant's witness has stated in evidence before the court that the plaintiff did not enter into a contract of employment with the defendant. Onthe contrary, it is observed that the letter of promotion issued by the defendant which was marked as exh P–1 (see pp 51–53 of the record of appeal Vol 1) constitutes the employment contract between the plaintiff and the defendant. I think the notion of the defendant being a separate and distinct entity from its subsidiaries falls within the ambit of the Companies Act 1965 and comes within the ambit of the company law. By virtue of the said Order, in the Originating Petition No. D1–26–9–90, the share capital of API and its wholly-owned subsidiaries which have been cancelled and the shares from the defendant which have been issued to API and its subsidiaries and the Registrar of Companies has accordingly been notified of it. The said Order at para 5 (at p 234 of the record of appeal Vol 2) inter alia states:

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That the notice of the registration by the Registrar of Companies of this Order (so far as it confirms the reduction of the capital of the first Petitioner) and of the said Minute be published once in the *New Straits Times* newspaper within thirty (30) days after such registration.

[25] In *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 at p 112, Salleh Abas FJ (as he then was) had this to say about the existence of the notion of separate entity in company law:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift 'the veil of incorporation' (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or vice versa as was decided in *Smith, Stone and Knight v Birmingham Corporation* [1938] 4 All ER 116; *Re FG (Films) Limited* [1955] 1 WLR 483; and *Firestone Tyre & Rubber Co v Llewelyn* [1957] 1 WLR 464. Professor Gower in his *Principles of Modern Company Law*, 3rd Ed, p 213, said that the courts:
>
> > 'are coming to recognise the essential unity of a group enterprise rather than the separate legal entity of each company within the group. …'

[26] In the case of *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 the Federal Court judge Choong Siew Fai CJ (Sabah and Sarawak) said at p 543:

> We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, i.e. that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies — a principle firmly established since *Aron Salomon v A Salomon & Co Ltd* (1897) AC 22. However, since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus, in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies. …

[27] In the case of *DHN Food Distributors Ltd and Others v London Borough of Tower Hamlets* [1976] 3 All ER 462, Lord Denning MR (as he then was) has inter alia stated at p 467:

> Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co (Wakefield) Ltd v Caddies* [[1955] 1 All ER 725]. So here. This group is virtually the same as

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a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

[28] Based on the principles expounded in the above cases and based on the evidence that was before the court the plaintiff has established the fact that there is privity of contract between the plaintiff and the defendant. It is abundantly clear that the subsidiaries of the defendant were bound hand and foot to the defendant.

[29] Based on the evidence that was before the court the plaintiff has established the following, which was confirmed by the defendant's witness, one Lew Kwong Ann, that is:

(1) from 1970 when the plaintiff commenced his employment with API, up and until 1 July 1990, the plaintiff's terms and conditions of employment were governed by a Collective Agreement entered into between the defendant and the National Union of Petroleum and Chemical Industries Workers marked as exh P–4 (see pp 140-165 of the record of appeal Vol 1).

(2) From 1 July 1990, when the plaintiff was instructed by the defendant to relinquish his membership in the union, the plaintiff's terms and conditions of employment were governed by the API terms and conditions of service for executive staff. It must be borne in mind that these terms and conditions of employment were never terminated, withdrawn, rescinded or annulled in anyway whatsoever by the defendant and there was no evidence before the court in the record of appeal that appears to the contrary (see p 28 of the record of appeal Vol 1).

(3) As from 1 December 1990, the defendant issued a manual more properly known as the Uniphoenix Corporation Bhd Executive Scheme of Service. Article 3(4) of the manual states:

> Where any terms exists in the individual contract of service of those executives within the scope of this manual, which is in conflict with the provisions of this manual, the provisions of this manual shall prevail. This manual is drawn to cover all existing terms and conditions prior to the enforcement of this manual and therefore supercedes all the terms and conditions earlier provided in the letter of appointments prior to the date of enforcement of this manual.

[30] It is observed that the defendant's witness has stated in evidence when the court sought clarification on the retirement benefit and resignation benefits clause, that this was a common practice within the plastic industries way back since 1960s. When the defendant issued the said manual referred to as exh P–2 (see pp 54–127 of the record of appeal Vol 1), the defendant has not made it explicit and clear to the plaintiff and to all the executives that the defendant was revoking, rescinding, terminating or annulling the provisions of the retirement benefits and resignation benefits clause provided for in the collective contract known as the API Terms and Conditions of

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Service for Executive Staff. Neither has the defendant made it known in clear and unequivocal terms that the API Terms and Conditions of Service for Executive Staff will no longer be applicable to the executives. All that the defendant has stated is, '… where any terms exist … which is in conflict with the provisions of this manual … this manual shall prevail … . This manual … supercedes all the terms and conditions earlier provided in the letter of appointments prior to the date of enforcement of this manual …'. This does not in anyway mean that the API Terms and Conditions of Service for Executive Staff which is a collective contract, which was applicable to the plaintiff and which was adopted by the defendant prior to 1 December 1990 no longer exist. I think exhs P–2 and P–3 co-exist. What the manual seeks to do is only to supersede terms and conditions provided for in the individual letter of appointment issued to the employees of the defendant. Since the defendant's witness has confirmed this fact in evidence that between the period of 1 July 1990 and 1 December 1990, the plaintiff was governed by exh P–3, I must consider art 19 (p 139 of the record of appeal Vol 1) which provides for the following:

> Article 19 Amendments
>
> All the rules and regulations and terms of employment may be amended or new ones added at the Company's discretion provided any change is notified to all exempt staff.

[31] Based on the facts and the evidence that was before the court, the defendant has not in anyway whatsoever notified the plaintiff and the executive staff of the defendant that art 18 as contained in exh P–3 has been amended or a new provision has been added and that is why I think that exhs P–2 and P–3 co-exist. If the defendant had intended to revoke, rescind, terminate or annul the provisions as contained in exh P–2, the defendant should have done so in no uncertain terms and should have done so by giving a written notification to the plaintiff in no uncertain terms which, based on the evidence which is before this court the defendant has not done so. The defendant cannot now call upon this court to rewrite the terms of the employment contract the defendant has adopted which was and has been applicable to the plaintiff. Neither can the defendant seek a favourable interpretation of the co-existing contracts which would indeed be repugnant to or inconsistent with the terms and conditions of the prevailing contract and further, neither can the defendant make out a possible intention favourable to the defendant's view that the resignation and/or retirement benefits is not provided for in exh P–2. I am of the opinion that in employment relations as well as in commercial relations, customs, practice, or terms and conditions that have been generally expressed in contracts which have not been revoked, rescinded, terminated or annulled by the introduction of subsequent terms and conditions of employment are to be assumed by the court to be so prevalent in a trade, industry or locality so as to form the foundation of all contracts made within that trade, industry or locality and the defendant's witness has indeed given evidence before the court when the witness stated, 'this was a common practice within the plastic industries way back since the 1960s'.

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[32] In the case of *London Export Corporation, Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 411, Lord Justice Parker had this to say at p 422:

> I need not refer to the authorities in detail, as my Lord has done that, and I will refer only to two passages. First, the passage in the judgment of Lord Campbell, CJ, in *Humfrey v Dale*, (8) ((1857) 7 E & B, 266) where he says (at p 273):
>
> 'Now neither collateral evidence nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract.'
>
> Then, he says (at p 274):
>
> 'Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument.'
>
> Lord Blackburn in *Tucker v Linger* (6) ((1883) 8 App Cas 508) says this (at p 511):
>
> 'This custom, when proved, is to be considered as part of the agreement; and if the agreement be in writing, though the custom is not written it is to be treated exactly as if that unwritten customary clause had been written out at length. But if upon the face of the written agreement there is some clause which expressly says, 'We exclude the unwritten customary incident,' of course it is excluded; and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then too the unwritten clause must yield to and is excluded by the written one.'

[33] In the case of *British Broadcasting Corporation v Hearn and Others* [1978] 1 All ER 111, Lord Denning MR (as the then was) held as follows at p 116:

> It was suggested that those words related only to the contractual terms and conditions. Some of us said as much in *Cory Lighterage Ltd v Transport and General Workers Union* [[1975] 1 All ER 504, [1957] AC 396]. But that, I think, wold be too limited. Terms and conditions of employment may include not only the contractual terms and conditions but those terms which are understood and applied by the parties in practice, or habitually, or by common consent, without ever being incorporated into the contract.

[34] Regarding the issue of resignation benefits, the Chairman of the Industrial Court, Mr Tam Kam Weng in the case of *Automotive Manufacturers (M) Sdn Bhd, Pahang v Transport Equipment & Allied Industries Employees Union* [1986] 1 ILR 404 held:

> The company adduced evidence that all the years in the service of the company the claimant was given increments and also bonus though they were at the discretion of the company. It is the court's decision that these cannot be the yardstick to allow the company to introduce retirement clause to the employees to retire at the age of 55 years old just because increments and bonus were given. These benefits had been given to the employees since its inception in 1969 and whether the employees were to retire at 55 or after they were still given and there was nothing to the contrary that these benefits were to be given on condition that the employees had to accept retirement age at 55. The claimant's contract of employment was in writing and as such any change to the fundamental terms such as the retirement clause ought to be agreed by both parties.

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[35] And further in the case of *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong* [1998] 3 ILR 843, the Industrial Court stated at p 847 as follows:

> The court has little difficulty in agreeing with the proposition that no one party to an employment contract can unilaterally vary a term of the said contract or impose a new term therein. Does it mean therefore that in a situation where the employment contract is silent on the matter of retirement age of an employee, and when no such term can be implied into the contract, the latter is entitled to be employed for life, ie until the expiration of the life span endowed upon him? That can hardly be a sensible proposition.
>
> The claimant does not, however, make so extravagant a claim to life-long employment; he seeks only the right to be retained in the company's employment until he attains the age of 60 and not to be retired before then.

[36] Even though exh P–2 has been introduced by the defendant on 1December 1990, it does not state anywhere in the manual that exh P–3 has been revoked, rescinded, terminated or annulled. All that exh P–2 states is that P–2 shall supersede terms and conditions earlier provided in the letter of appointment prior to the date of the enforcement of exh P-3. Here again, the defendant had completely failed to convince the court that the defendant's intention was to withdraw the retirement benefits payable on resignation to all employees when the employees resign from their services with the defendant where the benefits will be computed according to the retirement benefit article.

[37] An issue has been raised that some other party is liable to make the payment of retirement benefits on the resignation of the plaintiff. The fact is that the defendant had sold its subsidiaries to a third party. Exhibit D–4 (on pp 249-263 of the record of appeal Vol 1) states that an agreement had been entered into between API and Corporate Beam dated 3 January 1996 and at p 252. Clause 2.01 states that the sale and purchase of the shares are conditional. Even if the defendant has sold its subsidiary, the issue was a non-starter. The reason being that the plaintiff's last day of service with the defendant was 1 January 1996 (see exh P–9 appearing at p 170 of the record of appeal Vol 1). Even if the defendant has sold its subsidiary, s 12(3) of the Employment Act 1955 (Act 265) makes it mandatory for the defendant to serve on the plaintiff a notice of termination and to obtain the plaintiff's consent to be transferred to a new employer. However, the plaintiff's consent was not sought by the defendant and there was no evidence before the court both documentary and otherwise, that the defendant had sought the plaintiff's consent to be transferred to the purported new company. In the case of *Radtha d/o Raju & Ors v Dunlop Estates Bhd* [1996] 1 MLJ 561 at p 567, Abdul Malek Ahmad JCA (as he then was) held as follows:

> We are only concerned with the issue as to whether the fact of a change of ownership of the business amounts to a termination. In this regard, s 12(3) is abundantly clear in statutorily declaring that it does and that a notice of termination is nothing less than mandatory. This is strengthened by the fact that the parties had agreed in their agreed statement of facts that there was in fact a change of ownership of the estate on 1 September 1990.

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[38] Further, at p 570, Shaik Daud JCA held as follows: **A**

> It is my view that the object of this subsection is to protect the employee in case of change of ownership of a particular business or part of that business. It is to provide security in his employment. If no notice is required to be given then I feel that his position as employee will be neither here nor there."

[39] It is crystal clear from the evidence in this case that the defendant had **B** absolute control over its wholly owned subsidiaries which were bound hand and foot to the defendant and that the defendant should not be allowed to evade their contractual obligations and duties to the plaintiff by claiming that there is no privity of contract between the plaintiff and the defendant.

[40] In the premises this appeal of the defendant is dismissed with costs. **C**

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed

_____ **D**

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